FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

NEW AMSTERDAM CASUALTY COMPANY, a Corporation,
Petitioner,
vs.
CRAIGHEAD RICE MILLING COMPANY, a Corporation,
Respondent.

No. 778...

J. M. JACK and L. M. JACK, a Co-Partnership, Doing Business as JACK CONSTRUCTION COMPANY,
Petitioners,
vs.
CRAIGHEAD RICE MILLING COMPANY, a Corporation,
Respondent.

No. .....

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

CHARLES FRIERSON,
JOE C. BARRETT,
ARCHER WHEATLEY,
Jonesboro, Arkansas,
Counsel for Respondent.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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LIST OF AUTHORITIES CITED.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

The respondent respectfully shows to this Honorable Court that the record herein does not present facts sufficient to justify this Court in granting the Writ and respectfully prays that the petition be denied.

For reasons therefor, respondent states:

I.

This suit involves a controversy between the owner, the contractor and contractor's bondsman growing out of the breach of a building contract and affecting the rights of three private litigants. The public interest as distinct from the interest of private litigants is not involved.

II.

This suit involves no federal constitutional or statutory question.

III.

The decision of the Circuit Court of Appeals presents no conflict either with decisions of this court, or decisions of other circuits, or decisions of the Supreme Court of Arkansas.

IV.

Point 5 relied on by petitioners does not present a question of indispensable parties under the rules of civil procedure or under the old Equity Rules. Furthermore, this question was raised for the first time in petitioner's reply brief in the Circuit Court of Appeals and was not an issue before the trial court.

CRAIGHEAD RICE MILLING COMPANY,

By: CHARLES FRIERSON,
JOE C. BARRETT,
ARCHER WHEATLEY,
Counsel for Respondent.

I.

STATEMENT.

A statement of the case by Respondent is necessary.

Respondent entered into a contract with Petitioner Jack Construction Company for erection of a rice drier and storage bins (R. 16). New Amsterdam Casualty Company was surety on the performance bond. When the contractor had erected the general structure of the plant, the Owner (Respondent) thought the work complied with the plans and specifications. The Surety repeatedly requested Respondent to release part, then all, of the retained percentage called for by the construction contract (R. 117-118, 366, 701) and then requested payment of additional sums over the full contract price to the contractor's creditors (R. 147, 365-366). After long negotiations the Surety, on March 27, 1946, refused to complete the structure and Respondent was forced to pay out $13,887.53 more than the contract price (R. 142) to creditors of the Contractor who had potential liens against the building. To protect the structure against foreclosure of the first mortgage of $250,000, and then mistakenly believing a small amount of additional expense would complete the building (R. 373, 379, 588) (in line with repeated assurances of the contractor) (R. 98-100, 222) Respondent borrowed an additional $30,000 from Union Planters National Bank & Trust Company, of Memphis, Tennessee, on April 26, 1946, giving as collateral security a pledge of any payment received from the surety on the contractor's bond. The Bank agreed to release the assignment when $30,000 was paid to it (R. 1121). On November 25, 1946, when the assignment was first pleaded by Petitioner Surety, approximately $18,000 had been repaid (R. 57) and the entire $30,000 was paid and the assignment was released and discharged approximately three months be-

fore the trial lasting two weeks in the District Court. On December 16, 1946, Respondent filed in the District Court the release of the Bank, and the latter thereafter had no interest whatever of any kind in the assignment.

At no time did Petitioner ever raise in the District Court the question of the Bank being a party to the suit.

The Bank had no interest at the time of trial, and the present contention along that line is made with the knowledge of Petitioner that:

(1) The assignment was as collateral security only, containing a covenant to release as soon as the $30,000 was repaid;

(2) The Bank filed a receipt for the payment of the $30,000 and a discharge of the assignment nearly three months before the trial;

(3) No response or further pleading of any kind with reference to the release by the Bank was filed by Petitioners in the District Court;

(4) The Bank having no interest, and there being no dispute about the matter in the District Court, the record on appeal (containing 1152 pages) in compliance with Rule 75e, necessarily omitted pleadings and orders about questions not covered by the assignment of error or points relied on for the appeal.

Replying to a suggestion similar to that now made, and first contained in Petitioner's reply brief in the Circuit Court of Appeals, Respondent was permitted to file with the Circuit Court of Appeals a certified copy of the release by the Bank. There is, therefore, a persistent effort by Petitioners to make th. Appellate Courts think the Bank had some interest in the assignment at the time of trial, when Petitioners know this is not a fact.

Respondent therefore submits herewith authenticated copies of said pleading, showing the release and showing the filing date of December 16, 1946, for filing and to be a part of the record, and respectfully prays that this statement and brief be treated as a motion or petition for amendment or completion of the record to include said pleading filed in the District Court, which is as follows:

12-16-46 copy to A. L. Adams Atty

Grady Miller, Clerk, by Bess Mathes, D. C.

Filed Dec. 16, 1946
Grady Miller, Clerk
By Bess Mathes, D. C.

In the District Court of the United States,
Jonesboro Division, of the Eastern
District of Arkansas.

Craighead Rice Milling Company, Plaintiff,
vs.
New Amsterdam Casualty Company, et al., Defendants.
No. J-444.

Notice and Amendment by Plaintiff With Release of Assignment to Bank.

To Lowell Taylor and Arthur Adams, Attorneys for Defendants:

You are notified that plaintiff will ask leave to file on December 16, 1946, the Amendment to its Answer, Copy of which is hereto attached. Plaintiff asks leave of Court to file the following Amendment to its Answer, to-wit:

Plaintiff says that the assignment as collateral security executed to Union Planters National Bank and Trust Company, of Memphis, Tennessee, has been released and the formal release of said assignment dated December 14, 1946, is hereto attached as an exhibit and asked to be made a part hereof.

Wherefore, plaintiff prays as in other pleadings and for all other proper relief.

Chas. D. Frierson,
Frierson & Frierson,
Attorneys for Plaintiff.

Verification.

Chas. D. Frierson, being sworn, doth solemnly swear that the statements in the foregoing Amendment are true.

This December 16, 1946.

Chas. D. Frierson.

Subscribed and sworn to before me on this December 16, 1946.

My com. exp. Feb. 5, 1949.

Clara Browder,
(Seal) Notary Public.

Filed Dec. 16, 1946,
Grady Miller, Clerk,
By Bess Mathes, D. C.

Release of Assignment.

Whereas, Craighead Rice Milling Company of Jonesboro, Arkansas, heretofore on April 25, 1946, by instrument in writing duly assigned unto Union Planters National Bank & Trust Company, its successors and

assigns, any and all claims, actions or causes of action which it might then or thereafter have against New Amsterdam Casualty Company under the terms and provisions of a certain performance and payment bond, executed by New Amsterdam Casualty Company as surety for J. M. Jack Construction Company in connection with its contract to construct a rice drying and storage plant and mill at Jonesboro, Arkansas, for Craighead Rice Milling Company, together with any and all moneys which said Craighead Rice Milling Company might at any time receive from or for the account of New Amsterdam Casualty Company in payment or satisfaction of its obligations under said bond as well as all rights which Craighead Rice Milling Company might then or thereafter have to receive from or for the account of New Amsterdam Casualty Company any moneys in payment or satisfaction of its obligation under said bond; and

Whereas said assignment was executed as collateral security for the payment by Craighead Rice Milling Company of an indebtedness to Union Planters National Bank & Trust Company in the amount of $280,000.00 and contained a provision that when Union Planters National Bank & Trust Company should have received from said Craighead Rice Milling Company or anyone acting in its behalf, or from New Amsterdam Casualty Company the sum of $30,000.00, said Union Planters National Bank & Trust Company would thereupon release said assignment; and

Whereas, on December 3, 1946, Union Planters National Bank & Trust Company received from Craighead Rice Milling Company the sum of $30,000.00 for application upon said indebtedness and said sum was credited thereon;

Now, Therefore, said Union Planters National Bank & Trust Company does hereby fully release and discharge said assignment of April 25, 1946, this 14th day of December, 1946.

Union Planters National Bank & Trust Company,
By R. J. McElroy,
Vice-President.

In the District Court of the United States
for the Jonesboro Division of the
Eastern District of Arkansas.

I, Grady, Miller, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the Jonesboro Division thereof, do hereby certify that the annexed and foregoing is a true and correct copy of a pleading and attached exhibit filed in this court on December 16, 1946 and a part of the record in the case of Craighead Rice Milling Company, a Corporation, v. New Amsterdam Casualty Company, a Corporation, and J. M. Jack and L. M. Jack, co-partners doing business as Jack Construction Company, Civil J-444, and that no reply or answer to said amendment appears in the record of the District Court.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at office in the City of Jonesboro, Arkansas, This May 8th, 1948.

Grady Miller,
Clerk of the District Court of the United States for the Jonesboro Division of the Eastern District of Arkansas.
(Seal)
By Bess Mathes,
Deputy Clerk.

II.

ARGUMENT.

SUMMARY OF ARGUMENT.

A. Respondent was not barred by the temporary Assignment as Collateral.

B. The Decision of the Circuit Court of Appeals was not in conflict with other Decisions.

C. The Assignee was not an Indispensable Party.

D. The Issue Can Not Be Raised Here for the First Time.

STATEMENT OF POINTS TO BE ARGUED, WITH AUTHORITIES.

A. Respondent was not Barred by the Temporary Assignment as Collateral.

Aetna Casualty and Surety Co. v. Big Rock Stone & Mat. Co., 180 Ark. 1, 20 S. W. 2d 180;
Erie R. R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487;
Garetson-Greason Lbr. Co. v. Home Life & Acc. Co., 131 Ark. 525, 199 S. W. 547;
National Mutual Cas. Co. v. Cypret, 207 Ark. 11, 179 S. W. 2d 161;
Ocean Acc. & Guaranty Corp'n v. S. W. Bell Tel. Co., 100 F. 2d 441, cert. den. 306 U. S. 658, 83 L. Ed. 1056, 59 S. Ct. 775, 122 A. L. R. 133;
Planters Nat. Bank v. Lawrence County Bank, 176 Ark. 228, 2 S. W. 2d 704;
2 Cooley's Briefs on Insurance (2nd Ed.) 1769;
3 Cooley's Briefs on Insurance (2nd Ed.) 2900.

B. The Decision of the Circuit Court of Appeals was not in Conflict with other Decisions.

C. The Assignee was not an Indispensable Party.

Bordieu v. Pacific Western Oil Co., 299 U. S. 65, 70, 81 L. Ed. 42, 57 S. Ct. 51, 53;
Capital Fire Ins. Co. v. Langhorne (8 Cir.), 146 F. 2d 237;
Wesson v. Crain (8 Cir.), 165 F. 2d 6.

D. The Issue Cannot Be Raised Here for the First Time.

Blair v. Osterlein Mac. Co., 275 U. S. 220, 225, 72 L. Ed. 249, 252, 48 S. Ct. 87;
Jesionowski v. Boston & Maine R. R., 329 U. S. 452, 91 L. Ed. 416, 67 S. Ct. 401;
McCandless v. Furlaud, 293 U. S. 67, 79 L. Ed. 202, 55 S. Ct. 42;
McComb v. Goldblatt Bros., Inc. (7 Cir.), 166 F. 2d 387, 389;
Mid Continent Pet Corp'n v. Keen (8 Cir.), 157 F. 2d 310;
Oklahoma v. U. S. Civil Ser. Com., 330 U. S. 127, 91 L. Ed. 794, 67 S. Ct. 775;
Pacific States Box & Basket Co. v. White, 296 U. S. 176, 186, 80 L. Ed. 138, 147, 56 S. Ct. 159;
Parker v. Motor Boat Sales, 314 U. S. 244, 86 L. Ed. 184, 62 S. Ct. 221;
Smith v. Porter (8 Cir.), 143 F. 2d 292.

A.

Respondent Was Not Barred by the Temporary Assignment as Collateral.

The "questions presented" by Petitioners all go to the idea that because the bond prohibited an "assignment" there was no cause of action. This was, of course, to be determined by the law of Arkansas: (Erie R. R. Co. v.

Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487) which is

(a) A surety bond is construed as an insurance policy: Aetna Casualty & Surety Co. v. Big Rock Stone & Mat. Co., 180 Ark. 1, 20 S. W. 2d 180.

(b) Any contract is assignable after loss: Garetson-Greason Lumber Co. v. Home Life & Accident Co., 131 Ark. 525, 199 S. W. 547; National Mutual Cas. Co. v. Cypret, 207 Ark. 11, 179 S. W. 2d 161; Planters Nat. Bank v. Lawrence County Bank, 176 Ark. 228, 2 S. W. 2d 704.

(c) The prohibition against assignments does not apply in any event to pledges or collateral agreements: 2 Cooley's Briefs on Insurance (2d Ed.) 1769; 3 Cooley's Briefs on Insurance (2d Ed.) 2900.

In Garetson-Greason Lumber Company v. Home Life & Accident Co., supra, an employee of appellant Lumber Company was injured, sued and recovered judgment. Appellant borrowed money from American Surety Company to pay the judgment and secured it by assignment of the right of action against appellee, which had insured appellant. The Court said:

> "Notwithstanding the restricted assignment clause in the policy to the effect that the policy should not be assigned without the written consent of the company indorsed on the policy by an executive officer of said company, Garetson-Greason Lumber Company had a right to assign its right of action against the Home Life & Accident Company to whomsoever it pleased. **The restriction simply prevented the assignment of the policy during its life, and had no application whatever to the assignment of a liability thereunder.** Maryland Casualty Co. v. Omaha Electric

Light & Power Co., 157 Fed. 514; McBride v. Aetna Life Ins. Co., 126 Ark. 528."

These Arkansas authorities make irrelevant the cases on assignment from other jurisdictions cited by Petitioners. See also for the general rule on assignment after loss, 122 A. L. R. 145 following Ocean Accident & Guar. Corp'n. v. Southwestern Bell Telephone Co., 100 Fed. 2d 441, Cert. den. 306 U. S. 658, 83 L. Ed. 1056, 59 S. Ct. 775, 122 A. L. R. 133. Practically all questions raised by Petitioners were decided in the Ocean Accident case, and this court found no ground for review. There is no reason for certiorari in the present litigation.

B.

The Decision of the Circuit Court of Appeals Was Not in Conflict With Other Decisions.

The "Reasons Relied on for the Allowance of the Writ" as set forth by Petitioners are simply copied from Rule 38 (5) of this Court and have no connection with the argument of Petitioners. No case is cited in conflict with the decision complained of. It is Hornbook law that parties are allowed to make their own contracts, but it is equally certain (which Petitioners ignore) that the courts have the right and duty to construe the words used, and to take into consideration the acts and conduct of the parties.

It must be borne in mind that when the assignment was made, April 25, 1946 (R. 1091, 1119-1121), the Contractor had ceased work, liens were being threatened by various material furnishers, the Surety had refused to complete, and the purpose of the instrument was to secure funds to discharge these potential liens, also the payments due on the first mortgage, all of which was made necessary by the default of Petitioners. **The loss had occurred, the con-**

tractor had defaulted, and the surety had refused to proceed or complete the building.

The decision of the Circuit Court of Appeals is strictly in line with the Arkansas authorities, and no case from any other court prior to Erie Railroad v. Tompkins (supra), affords grounds for issuance of the Writ.

When the bond was written, the word "assignment" in such contracts had a definite meaning, as construed by the courts. This meaning excluded pledges as collateral and transfers after loss. These interpretations by the courts were written into the bond itself and determined the liability of the parties thereunder—not the contentions of Petitioners.

C.

The Assignee Bank Was Not an Indispensable Party.

The statement of facts given above precludes any serious thought that the Bank was an indispensable party to the litigation. Petitioners did not so consider it, because the question was not raised in the trial court. Had the matter been a ground for complaint in the trial court, astute counsel would have raised the issue before spending two weeks trying the case before a jury. They knew the Bank had been paid, the assignment had been released, and that there was no basis for raising any such issue.

Even if the assignment had been in full force and effect at the time of trial, the Bank would not have been an **indispensable party.** It was and is a Memphis, Tennessee resident and its absence would not have destroyed the court's jurisdiction.

Bordieu v. Pacific Western Oil Co., 299 U. S. 65, 70, 81 L. Ed. 42, 57 S. Ct. 51, 53;

Capital Fire Ins. Co. of Cal. v. Langhorne (8 Cir.), 146 F. 2d 237;
Wesson v. Crain (8 Cir.), 165 F. 2d 6.

D.

The Issue Cannot Be Raised Here for the First Time.

The foregoing recitals show that the Bank was not even a proper party to the litigation at the time of trial, much less an indispensable party. Even if it was a proper party prior to the release of the assignment, Petitioners learned of the interest of the Bank in November, 1946, the case was tried in March, 1947, yet at no time was the question raised of there being any necessity for the Bank to be made a party. Following the filing of the release on December 16, 1946, Petitioners knew the Bank then had no interest. Having failed to raise the issue in the trial court, it is manifestly unfair to ask for relief on that ground here. This Court will not yield to such importunities.

Blair v. Osterlein Machine Co., 275 U. S. 220, 225, 72 L. Ed. 249, 252, 48 S. Ct. 87;
McComb v. Goldblatt Bros., Inc. (7 Cir.), 166 F. 2d 387, 389;
Pacific States Box & Basket Co. v. White, 296 U. S. 176, 186, 80 L. Ed. 138, 147, 56 S. Ct. 159;

> "It has long been a rule of practice that a reviewing court will not consider assignments of error not called to the attention of the trial court where such matters do not concern the jurisdiction of the court. It would manifestly be unfair to hold that the trial court had erred in a matter it had not considered. Litigants are not entitled to hide a point in an obscure pleading and pre-

sent it for the first time on review, but should fully and fairly acquaint the trial court with all matters relied upon." Maloney v. Brandt (7 Cir.), 123 F. 2d 779, 782, quoted in McComb v. Goldblatt Bros., Inc. (7 Cir.), 166 F. 2d 387, 389;

McCandless v. Furlaud, 293 U. S. 67, 79 L. Ed. 202, 55 S. Ct. 42;

"But an objection to plaintiff's legal capacity to sue will not be entertained if taken, for the first time, in the appellate court. The rule is of general application and has been applied in the Federal appellate courts to a variety of cases. * * * The appellate courts have refused to entertain the objection that the plaintiff was not the real party in interest. The reason for the rule is the broad one that a defect found lurking in the record on appeal, may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial court."

Oklahoma v. U. S. Civil Service Com., 330 U. S. 127, 91 L. Ed. 794, 67 S. Ct. 775;

"A failure to object in the trial court to a party's capacity is a waiver of that defect."

Jesionowski v. Boston & Maine R. R., 329 U. S. 452, 91 L. Ed. 416, 67 Sup. Ct. 401;

Parker v. Motor Boat Sales, 314 U. S. 244, 86 L. Ed. 184, 62 Sup. Ct. 221.

Claim for compensation filed by widow. Argued on appeal that "legal representative" must make claim. The objection was held to be made too late as not raised before the Commission or the District Court.

Smith v. Porter (CCA 8), 143 F. 2d 292.

Appellants, just as petitioners for this writ, raised a point for the first time in their reply brief (p. 296):

> "In their reply brief, filed on the day of submission of this case, appellants, for the first time, advanced the contention that they were not compensated on a salary basis, but on an hourly wage rate * * * This point was not included in appellants' brief in the statement of points intended to be relied on * * *. It does not appear from the record that the issue was raised or relied upon in the trial court * * * In these circumstances appellants are not entitled as of right to rely upon it here."
>
> Mid Continent Petroleum Corp'n v. Keen (CCA 8), 157 F. 2d 310.

Employee's exemption from provisions of Fair Labor Standards Act, was not raised in trial court, issue was not decided there, and point was not included in points relied on in appeal, the question was held not open for appellate court's consideration.

III.

CONCLUSION.

Respondent respectfully submits that no ground has been shown by petitioner for a review by this court of the decision of the Circuit Court of Appeals. The decision is in all respects consistent with the decisions of this court, with the decisions of other Federal Courts and with the decisions of the Supreme Court of Arkansas. Petitioner apparently takes the position that simply because the surety's contract prohibited an assignment, there could be no right of action against the bond, regardless of the nature of the assignment or the time thereof or the conditions which existed or had occurred. The law does not

thus favor a paid surety. The assignment complained of was after the loss had occurred, after default by the contractor and after the surety had refused to complete the contract. The assignment was as collateral security only, it provided for release on payment of $30,000, the payment was made and the assignment was discharged nearly three months before the trial. No question of defect of parties was raised in the lower court, the assignee had no right, title or interest in the matter at the time of trial, and the plea made to the jurisdiction of the court is frivolous.

CHARLES FRIERSON,
JOE C. BARRETT,
ARCHER WHEATLEY,
Counsel for Respondent Craighead
Rice Milling Company.